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No. 02-1019

In The Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

vs.

RODNEY JOSEPH GANT,

Respondent.

On Writ Of Certiorari To The Arizona Court Of Appeals, Division Two

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED FOR REVIEW

When police arrest the recent occupant of a vehicle outside the vehicle, are they precluded from searching the vehicle pursuant to *New York v. Belton* unless the arrestee was actually or constructively aware of the police before getting out of the vehicle?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

OPINION BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS 1

STATEMENT OF THE CASE 2

A. Material Facts 2

B. Proceedings Below 3

SUMMARY OF ARGUMENT 4

ARGUMENT 6

The *Gant* Court Erred In Determining That *Belton* Is Inapplicable When The Initial Police Contact Occurs After The Occupant Has Exited The Vehicle Of His Own Accord 6

A. Forging A Unique Rule For Automobile Searches Incident To Arrest, *Belton* Extended The *Chimel* "Immediate Area Of Control" Concept To Encompass The Vehicle's Passenger Compartment 7

1. *Belton* created a bright-line rule with arrest rather than pre-exit police contact authorizing the search 8

2. *Belton*'s bright-line rule minimizes the risks inherent in arresting recent occupants of automobiles 12

TABLE OF CONTENTS – Continued

Page

B. The "Contact-Before-Exit" Rule That *Gant* Adopted Is Untenable Because It Threatens Rather Than Fosters Public Safety And Frustrates *Belton's* Purpose – To Provide A Safe, Bright-Line Standard Procedure For Police To Follow 14

1. The *Gant* rule is arbitrary and dangerous 14

2. The subjective *Gant* approach foments confusion among officers in the field and invites endless suppression-hearing litigation on subjective minutiae that would be irrelevant under an objective, recent-occupancy test 18

C. The Only Workable Standard For This Category Of Cases Is That The Arrestee's Recent Occupancy Of The Vehicle At The Time Of Arrest Triggers A *Belton* Search, Without Regard To The Arrestee's State Of Mind 22

1. This Court intended in *Belton* to articulate a simple, workable standard 22

2. The only viable test is whether the arrest occurred while the individual was a recent occupant of the vehicle 24

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Agnello v. United States, 269 U.S. 20 (1925) 9

Almeida-Sanchez v. United States, 413 U.S. 266 (1973) 10

Atkins v. Parker, 472 U.S. 115 (1985) 15

Atwater v. City of Lago Vista, 532 U.S. 318 (2001) 11, 23

Bailey v. State, 12 P.3d 173 (Wyo. 2000) 11, 12

California v. Carney, 471 U.S. 386 (1985) 9

Cardwell v. Lewis, 417 U.S. 583 (1974) 15

Chimel v. California, 395 U.S. 752 (1969) ..... *passim*

Cooper v. California, 386 U.S. 58 (1967) 27

Henry v. United States, 361 U.S. 98 (1959) 25

Knowles v. Iowa, 525 U.S. 113 (1998) 9, 11, 12

Michigan v. Long, 463 U.S. 1032 (1983) 11, 24

New York v. Belton, 453 U.S. 454 (1981) ..... *passim*

Ohio v. Robinette, 519 U.S. 33 (1996) 19

Oregon v. Kennedy, 456 U.S. 667 (1982) 27

Plakas v. Drinski, 19 F.3d 1143 (7th Cir. 1994) 13, 26

Polke v. State, 528 S.E.2d 537 (Ga. App. 2000) 12

Preston v. United States, 376 U.S. 364 (1964) 9

Robbins v. California, 453 U.S. 420 (1981) 10

Scott v. United States, 436 U.S. 128 (1978) 19

South Dakota v. Opperman, 428 U.S. 364 (1976) 27

State v. Gant, 43 P.3d 188 (Ariz. App. 2002) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

State v. Gonzalez, 487 N.W.2d 567 (Neb. App. 1992).....13, 17

State v. McLendon, 490 So. 2d 1308 (Fla. App. 1986) 17, 26

State v. Medrano, 914 P.2d 225 (Ariz. 1996).....19

State v. Wanzek, 598 N.W.2d 811 (N.D. 1999) 12, 17

Terry v. Ohio, 392 U.S. 1 (1968)..... 9

United States v. Arango, 879 F.2d 1501 (7th Cir. 1989).....25

United States v. Cortez, 449 U.S. 411 (1981).....25

United States v. Doward, 41 F.3d 789 (1st Cir. 1994) 13

United States v. Edwards, 415 U.S. 800 (1974) 9

United States v. Robinson, 414 U.S. 218 (1973).... 10, 11, 19

United States v. Ross, 456 U.S. 798 (1982).....10

United States v. Sanders, 994 F.2d 200 (5th Cir. 1993).....14, 26

United States v. Thornton, 325 F.3d 189 (4th Cir. 2003).....15, 26, 27

Wade v. Hunter, 336 U.S. 684 (1949).....27

Washington v. Chrisman, 455 U.S. 1 (1982).....11

Whren v. United States, 517 U.S. 806 (1996) 19

Wyoming v. Houghton, 526 U.S. 295 (1999) 9

CONSTITUTIONAL PROVISIONS

U.S. Const. art. III, § 2 1

U.S. Const. amend. IV .....*passim*

U.S. Const. amend. XIV, § 1..... 2

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1257(a) 1

OTHER

LaFave, Wayne R., *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 S. Ct. Rev. 127 23

OPINION BELOW

The Arizona Court of Appeals' opinion is reported as *State v. Gant*, 202 Ariz. 240, 43 P.3d 188 (Ariz. App. 2002). Pet. App. A1-A12. The Arizona Supreme Court's order denying review without comment is not reported. Pet. App. B.

STATEMENT OF JURISDICTION

The Arizona Court of Appeals, Division Two, entered its judgment on March 29, 2002. Pet. App. A-1. The Arizona Supreme Court issued its order denying review on September 26, 2002. Pet. App. B. The State of Arizona filed the Petition for Writ of Certiorari in this Court on December 23, 2002, and this Court granted the petition on April 21, 2003. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment is applicable to the states through the Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

> Section 1. No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Material Facts.

Investigating a report of possible narcotics activity, police officers knocked on the door of Gant's residence. Pet. App. A, at ¶ 3. Gant answered the door and lied to the officers, stating that the resident was not there. *Id.*; J.A. 5, 10, 19, 31. The officers left the residence but returned later that day after learning of an outstanding warrant for Gant's arrest. Pet. App. A, at ¶ 3. When they returned, the officers encountered other individuals on the premises, one of whom had a crack pipe in her purse. *Id.*; J.A. 11-12, 31. Then Gant arrived. Pet. App. A, at ¶ 3. As Gant pulled into the driveway, an officer shined a flashlight into the car, recognizing Gant from the previous contact. *Id.*; J.A. 5, 10-11, 20. While the officer was walking toward the car, Gant got out and started walking toward him. Pet. App. A, at ¶ 3; J.A. 5, 20. The officer called Gant by name, and Gant acknowledged his identity. *Id.* The officer immediately arrested him on the warrant and for driving on a suspended license. Pet. App. A, at ¶ 3; J.A. 5, 20, 30-31. Officers secured Gant in handcuffs in a patrol car and searched the passenger compartment of Gant's car, where

they found a handgun and cocaine that gave rise to charges of unlawful possession of cocaine for sale and of drug paraphernalia. Pet. App. A, at ¶¶ 1, 3; J.A. 5-7, 11.

B. Proceedings Below.

The trial court denied Gant's suppression motion, holding that the police had conducted a lawful search incident to Gant's arrest. Pet. App. A, at ¶ 5. On review of Gant's convictions, the Arizona Court of Appeals reversed, finding *New York v. Belton*, 453 U.S. 454 (1981), inapplicable because Gant "voluntarily – that is, not in response to police direction – stopped his vehicle, exited it, and began to walk away from it." Pet. App. A, at ¶ 9. The court held that the record did not evince any attempt by the police to initiate contact while Gant was in the vehicle, or indicate that Gant had attempted to evade contact, or show that Gant was aware of the police before alighting. *Id.* at ¶ 13.[1]

The court of appeals rejected the State's argument that Gant's recent occupancy of the vehicle justified, without more, the search of the passenger compartment incident to the arrest. Instead, the appellate court held that the trial court had erred in refusing to suppress the evidence because *Belton*, "[b]y its own terms, . . . applies

[1] The operative facts are not in dispute. Although the Arizona Court of Appeals characterized the trial court record as insufficient to meet the State's burden of proving the constitutionality of the warrantless search, the alleged deficiency related solely to the subjective factors that the *Gant* court held dispositive – factors that the State contends are irrelevant: whether the police attempted to make contact before Gant exited the vehicle and whether Gant was aware of the police before he did so.

only when the officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation . . . while the defendant is still in the automobile, and the officer subsequently arrests the defendant (regardless of whether the defendant has been removed from or has exited the automobile)." *Id.* at ¶ 11 (internal quotations omitted). The court regarded Gant as a "pedestrian" rather than as a recent occupant of the vehicle within the meaning of *Belton* simply because he had exited the vehicle of his own accord before the initial police contact occurred. *Id.* at ¶ 15. The court instead relied on *Chimel v. California*, 395 U.S. 752, 762-63 (1969), in which this Court held that an officer who arrests a person in his home may search incident to the arrest the area within the person's "immediate control," that is, the area within which the person could reach a weapon or destructible evidence. The court concluded that the search was invalid because the passenger compartment of Gant's vehicle was not within Gant's "immediate control" within the meaning of *Chimel* at the time of the arrest. Pet. App. A, at ¶¶ 15-18.

The State's petition for discretionary review by the Arizona Supreme Court was denied without comment, allowing the court of appeals' opinion to stand. Pet. App. B.

SUMMARY OF ARGUMENT

In *New York v. Belton*, the defendant was arrested after exiting his vehicle. This Court upheld a search of the vehicle's passenger compartment, stating that "[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous

incident of that arrest, search the passenger compartment of that automobile." 453 U.S. at 460. This Court grounded its holding on the historic rationales underlying the search-incident-to-arrest doctrine – officer safety and preservation of evidence – and declared that in this "category of cases," the potential dangers to police officers are presumed to exist in every instance. *Id.*

The "initial contact" rule invented by the court below – holding that *Belton* does not apply to a recent occupant of a car unless the arrestee exited the car *after* police contact – places an arbitrary limit on *Belton* that is entirely divorced from, and at war with, *Belton*'s rationale. A recent occupant of a vehicle can just as easily grab a weapon or evidence from the interior of a car whether or not he or she exited the vehicle after police contact. Indeed, the "initial contact" rule compromises police security and surveillance by forcing or encouraging officers to clearly announce their presence to a suspect and/or rapidly approach a suspect's vehicle, when doing so is contrary to sound law enforcement practice. The "initial contact" rule also demands a subjective and unworkable inquiry into an arrestee's motive for exiting a vehicle and fosters greater uncertainty in an area where predictability is of paramount importance.

Rather, *Belton* applies whenever the passenger compartment of a vehicle is – arguably and generally – "within the area into which an arrestee might reach in order to grab a weapon or evidentiary item." Nothing about the common and routine police procedure used in Gant's case – where an arrestee is secured in a nearby police arrest vehicle – removes the arrestee from the scope of *Belton*. The identical factors justifying the search in *Belton* are equally applicable here: the peculiar dangers of

a vehicle stop and arrest, the threat that an arrestee – or other nearby confederates or onlookers – poses in such a situation, the need for a bright-line rule applicable to everyday arrest scenarios, and the lesser privacy interests associated with an automobile.

ARGUMENT

The *Gant* Court Erred In Determining That *Belton* Is Inapplicable When The Initial Police Contact Occurs After The Occupant Has Exited The Vehicle Of His Own Accord.

The court of appeals misconstrued *Belton* by adding subjectivity to the straightforward *Belton* rule. Contrary to the *Gant* court's view, when police arrest the recent occupant of a vehicle outside the vehicle, the arrestee's actual or constructive awareness of the police before exiting the vehicle is irrelevant. The criteria that trigger *Belton*'s implementation are purely objective: when the arrest occurs in close proximity to the individual's occupancy of the vehicle, the police may contemporaneously search the passenger compartment incident to the arrest.

The *Gant* rule contravenes *Belton*'s purposes by requiring police to "signal confrontation" before an individual alights. The requirement is arbitrary because it rests on a false distinction among occupants based on their subjective states of mind, and it is dangerous because signaling confrontation is likely to increase the risk in many instances, particularly in cases like Gant's where the suspect is aware of his criminal status and has a weapon in the automobile. Conducting the arrest outside the automobile achieves the same safety objectives regardless

whether the occupant knows that he is about to be arrested.

Because Gant was a recent occupant within the meaning of *Belton* when he was arrested and the search was contemporaneous with that arrest, the search was valid.

A. Forging A Unique Rule For Automobile Searches Incident To Arrest, *Belton* Extended The *Chimel* "Immediate Area Of Control" Concept To Encompass The Vehicle's Passenger Compartment.

In *Belton*, a police officer stopped a car for speeding, and while the four occupants were in the car he developed probable cause to arrest them for possession of marijuana. 453 U.S. at 455-56. He ordered Belton and the other occupants out of the car, arrested them, and secured them in "four separate areas of the Thruway." *Id.* at 456. He searched each of the four individuals and then returned to the automobile and searched the passenger compartment, finding cocaine in Belton's jacket. *Id.*

This Court upheld the search of the vehicle, holding that, "[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 460. Although this Court used the term "occupant" in stating its holding, the Court's statement of the facts made clear that Belton was outside the vehicle when he was arrested. *Id.* at 454. The Court's statement of the issue alluded to recent occupancy, and the opinion acknowledged that Belton "*had been* a passenger just before he was arrested." *Id.* at 460, 462 (emphasis added). In other words, the

Court recognized that at the time of Belton's arrest he was no longer an occupant of the vehicle but a recent occupant.

1. *Belton* created a bright-line rule with arrest rather than pre-exit police contact authorizing the search.

The starting point for this Court's analysis in *Belton* was the principle that "a lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area." *Id.* at 457 (citing *Chimel*, 395 U.S. at 763). In *Chimel*, this Court held that an officer who arrests a person in his home may search incident to the arrest the area within the person's "immediate control," that is, the area within which the person could reach a weapon or destructible evidence. 395 U.S. at 763. In *Belton*, the Court noted that lower courts had found no workable definition of the area within the arrestee's immediate control "when that area arguably includes the interior of an automobile and the arrestee is its recent occupant." 453 U.S. at 460. The Court also noted that many courts had struggled with the recurring question "whether, in the course of a search incident to the lawful custodial arrest of the occupants of an automobile, police may search inside the automobile *after the arrestees are no longer in it.*" *Id.* at 459 (emphasis added). Recognizing that *Chimel* had "established that a search incident to an arrest may not stray beyond the area within the immediate control of the arrestee," this Court set out to "determine the meaning of *Chimel*'s principles in this particular and problematic [context]." *Id.* at 460 & n.3 (emphasis added).

This Court grounded *Belton* on the historic rationales underlying the search-incident-to-arrest doctrine: officer safety and preservation of evidence. *Id.* at 457-59; *see also Knowles v. Iowa*, 525 U.S. 113, 116-17 (1998); *United States v. Edwards*, 415 U.S. 800, 802-03 (1974); *Chimel*, 395 U.S. at 762-63; *Preston v. United States*, 376 U.S. 364, 367 (1964); *Agnello v. United States*, 269 U.S. 20, 30 (1925). The need to disarm suspects and protect evidence makes it reasonable for police officers to search the person of the arrestee and the area within which he might obtain a weapon or evidentiary items. *Chimel*, 395 U.S. at 766, 768; *cf. Terry v. Ohio*, 392 U.S. 1, 19 (1968) (warrantless search must be justified by the circumstances permitting its initiation).

This Court observed that when "[an] arrestee is [a car's] recent occupant," the passenger compartment is "generally, even if not inevitably, within the area into which [the] arrestee might reach in order to grab a weapon or evidentiary ite[m]." *Belton*, 453 U.S. at 460 (citation and internal quotations omitted). Recognizing and adopting that generalization enabled the Court to "establish the workable rule [that] this category of cases requires." *Id.* This Court's express recognition in *Belton* that automobile searches incident to arrest comprise a category of their own finds support throughout this Court's Fourth Amendment jurisprudence, in which this Court has recognized that persons have a lesser expectation of privacy in automobiles. *See, e.g., Wyoming v. Houghton*, 526 U.S. 295, 303 (1999) (car searches intrude much less upon personal privacy and dignity than searches of persons, in light of the everyday exposure of automobiles and their contents to public view, police regulation, and potential involvement in traffic accidents); *California v. Carney*,

471 U.S. 386, 390-92 (1985) ("ready mobility" and pervasive regulation result in a reduced expectation of privacy in motor vehicles); *Almeida-Sanchez v. United States*, 413 U.S. 266, 279 (1973) (car searches are "far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building"). The reduced expectation of privacy in an automobile is "diminished further when the occupants are placed under custodial arrest." *Robbins v. California*, 453 U.S. 420, 431 (1981) (Powell, J., concurring) (citations omitted), *overruled by United States v. Ross*, 456 U.S. 798 (1982).

Viewing custodial arrests of recent occupants of automobiles as a special "category of cases," this Court specifically rejected case-by-case examination of the reasons supporting a search incident to arrest, deciding instead that the recent occupant's lawful arrest, without more, justifies the search. 453 U.S. at 459-60 (citing *United States v. Robinson*, 414 U.S. 218, 235 (1973)). In *Robinson*, this Court stated:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. . . . [A] search incident to the arrest requires no additional justification. . . .
>
> . . . Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not indicate any subjective fear of the [defendant] or that he did not himself suspect that [the defendant] was armed.

414 U.S. at 235-36; *see Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) ("[W]e have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review.").

Thus, the arrest itself is the triggering mechanism of a vehicle search incident to a recent occupant's arrest, not that the police initiated or attempted to initiate contact before the individual alighted from the vehicle or that any actual danger existed in a particular case. *See Robinson*, 414 U.S. at 235 ("It is the fact of the lawful arrest which establishes the authority to search . . . "). The likelihood that an arrestee will lunge for a weapon in a vehicle he recently occupied does not vary according to the circumstances under which he exited the vehicle. As this Court has emphasized, "[t]he danger to the police officer *flows from the fact of the arrest*, and its attendant proximity, stress, and uncertainty." *Id.* at 234 n.5 (emphasis added); *see also Washington v. Chrisman*, 455 U.S. 1, 7 (1982) ("Every arrest must be presumed to present a risk of danger to the arresting officer."). Regardless *why* an individual gets out of his car, "the 'bright line' that [this Court] drew in *Belton* clearly authorizes [a search of the car's passenger compartment] *whenever* officers effect a custodial arrest." *Michigan v. Long*, 463 U.S. 1032, 1049 n.14 (1983) (emphasis added). Under *Belton*, the dangers to police officers and the need to preserve evidence in the vehicle are presumed to exist when officers are arresting the recent occupants of automobiles. 453 U.S. at 461; *Bailey v. State*, 12 P.3d 173, 177 (Wyo. 2000); *cf. Knowles*, 525 U.S. at 116-17 (while the "legitimate and weighty" concerns for officer safety and

the need to preserve evidence justify a search of the vehicle in the case of a custodial arrest, they are insufficient to presumptively justify a search of the vehicle during a routine traffic stop when the occupant merely receives a citation).[3]

2. *Belton*'s bright-line rule minimizes the risks inherent in arresting recent occupants of automobiles.

Belton's bright-line rule permits police officers to arrest a recent occupant outside the vehicle and secure him away from the vehicle before conducting the search. This avoids the greater potential dangers involved in attempting, in the name of *Chimel*, to conduct the arrest and the search while the occupant is in the automobile, which in many instances the police technically would be able to do. *See State v. Wanzek*, 598 N.W.2d 811, 815 (N.D. 1999) ("Police officers should not have to race from their vehicles to the arrestee's vehicle to prevent the arrestee

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[3] *Knowles* established that *Belton* does not apply when the occupant is cited but not arrested. Because arrest alone triggers a *Belton* search, this Court's decision in *Knowles* is consistent with the State's argument. This Court determined that two of the concerns supporting a vehicle search incident to an arrest – officer safety and the need to preserve evidence – are either absent altogether or are present to a lesser extent in citation situations. *Knowles*, 525 U.S. at 118-19. The Court in *Belton* presumed that those concerns are present in every custodial arrest situation, obviating case-by-case analysis. 453 U.S. at 461; *Bailey*, 12 P.3d at 177. For *Belton* purposes, a citation (as in *Knowles*) is not the functional equivalent of a custodial arrest because only a valid arrest can trigger a *Belton* search. *Knowles* did not modify the *Belton* rule, but simply declined to extend its application beyond custodial arrests. *Bailey*, 12 P.3d at 177; *Polke v. State*, 528 S.E.2d 537, 540 (Ga. App. 2000).

from getting out of the vehicle in order to conduct a valid search."); *State v. Gonzalez*, 487 N.W.2d 567, 572 (Neb. App. 1992) (same).

Belton's requirement that the search be contemporaneous to the recent occupant's arrest, 453 U.S. at 460, does not preclude law enforcement officers from exercising their judgment to reduce the risks associated with the arrest. *See, e.g., United States v. Doward*, 41 F.3d 789 (1st Cir. 1994). In *Doward*, the arrestee's daughter, herself subject to an outstanding arrest warrant, unexpectedly emerged from the gathering crowd and attempted to intervene during a *Belton* search after the arrestee had been secured in a patrol car. 41 F.3d at 791-93 & n.5. The federal appellate court, rejecting a limitation on *Belton* that would "immerse the courts in second-guessing security decisions made by law enforcement officers in rapidly evolving circumstances," stated that the potential for such unpredictable developments "vindicate[s] the *Belton* rationale." *Id.* at 793 & n.5.

In Gant's case, other individuals on the premises who apparently were associated with Gant's illegal drug activity presented additional risk to the police. Also, because Gant presumably knew of the handgun in his car while the police did not, the situation would have been much more dangerous had the police rushed to the car, arrested Gant before he could alight, and held him there while searching the vehicle.

No procedure eliminates the danger inherent in an arrest. Even arrestees secured in a patrol car, like Gant, can escape and threaten officers or destroy evidence. *See, e.g., Plakas v. Drinski*, 19 F.3d 1143, 1144-45 (7th Cir. 1994) (suspect handcuffed in back seat of squad car

escaped from squad car and later confronted police); *United States v. Sanders*, 994 F.2d 200, 210 & n.60 (5th Cir. 1993) (citing incidents in which handcuffed arrestees killed police officers). But this Court wisely forged a rule in *Belton* that minimizes those dangers, thereby ensuring a much higher degree of safety in arrests effected in close proximity to automobiles. Conducting the arrest outside the automobile achieves the same safety objectives whether or not the occupant exits in response to a police contact.

B. The "Contact-Before-Exit" Rule That *Gant* Adopted Is Untenable Because It Threatens Rather Than Fosters Public Safety And Frustrates *Belton's* Purpose – To Provide A Safe, Bright-Line Standard Procedure For Police To Follow.

1. The *Gant* rule is arbitrary and dangerous.

In concluding that *Belton* applies only where the police signal, warn, or otherwise confront the occupant before he exits the vehicle, the *Gant* court adopted an arbitrary and dangerous limitation. The *Gant* "confrontation" rule contravenes *Belton*'s reasoning and its safety-oriented purposes, blurring the bright-line recent-occupancy test beyond any predictable, consistent applicability and dramatically increasing the dangers inherent in arrests involving occupants of automobiles. The *Gant* decision poses an arbitrary and dangerous dilemma for law enforcement officers: they must decide, in the heat of the moment, whether to somehow "signal confrontation" while the occupant is still in the vehicle or forego a *Belton* search in the event that the occupant alights "unsignaled" or "unconfronted."

This warning requirement fosters gamesmanship. It arbitrarily limits *Belton*, accomplishing nothing beyond giving drivers and passengers a head start to engage in dangerous conduct such as stepping on the accelerator rather than the brake, grabbing a firearm, or destroying evidence. *See Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) ("[W]here the automobile's owner is alerted to police intentions . . . , the motivation to remove evidence from official grasp is heightened."). Recently, a federal appellate court observed, in declining to impose a pre-exit confrontation rule:

> [W]hen encountering a dangerous suspect, it may often be much safer for officers to wait until the suspect has exited a vehicle before signaling their presence, thereby depriving the suspect of any weapons he may have in his vehicle, the protective cover of the vehicle, and the possibility of using the vehicle itself as either a weapon or a means of flight. Mandating that officers alert a suspect to their presence before he sheds the protective confines of his vehicle would force officers to choose between forfeiting the opportunity to preserve evidence for later use at trial and increasing the risk to their own lives and the lives of others. We decline to require officers to make this choice.

United States v. Thornton, 325 F.3d 189, 195 (4th Cir. 2003).

Not every occupant will respond violently to "signaled confrontation" or engage in a dangerous attempt to flee upon becoming aware of the police, but many will. Police officers in the field cannot be expected to foresee which occupants are so inclined. Every citizen is presumed to know what conduct the criminal laws proscribe. *See Atkins*

v. Parker, 472 U.S. 115, 130 (1985) ("All citizens are presumptively charged with knowledge of the law."). Thus, an occupant who has committed a criminal offense – Gant was wanted on a warrant and had contraband drugs in his car – presumably knows that he is subject to arrest at any time. Under such circumstances, where the individual may well be primed to flee or violently resist arrest, a *Gant*-style warning is not only superfluous but dangerous.

A "contact-before-exit" requirement is also a purely arbitrary limitation because it assumes a false distinction between occupants who are aware of the police and those who are not. Any person subject to arrest while in a car is potentially dangerous, precisely because he presumably knows his status. In Gant's case, the officers knew before Gant alighted that he was subject to arrest, but in many instances the police will not have that information until after the occupant is out of the vehicle. Precipitation or heavily tinted windows, for example, could conceal ongoing illegal activity or a wanted person's identity until he steps out of the vehicle. In terms of public safety, officer safety, and evidence preservation, there is no difference between a driver or passenger whom the police "stop," "contact," "signal," or otherwise challenge while he is still in the vehicle and a person whom the police do not "stop," "contact," "signal," or otherwise challenge until after he gets out of the vehicle, except that "signaling confrontation" may well escalate the risks. For example, a person bent on evading arrest is more likely to emerge brandishing a weapon when forewarned of police officers' presence. Gant had a handgun in his car. The *Gant* pre-exit warning rule does nothing but increase the potential danger to everyone concerned.

This Court should defer to police officers' training and discretion in determining how to conduct an arrest – either by "signaling confrontation" while the individual is in the car or by avoiding doing so until after the person gets out, depending on the circumstances. *See State v. McLendon*, 490 So. 2d 1308, 1309 (Fla. App. 1986) (*Belton* search upheld where undercover officer did not announce his presence until it was safe to arrest murder suspect inside a building, twenty to thirty feet from the door of the suspect's car). To hold otherwise would only foster gamesmanship – ensuring that the occupant has a head start on evasive action.

A police officer cannot know exactly when, why, or at what rate of speed an occupant will exit a vehicle. Consequently, if the *Gant* rule prevails, officers who for whatever reason have not "signaled confrontation" may make an otherwise unnecessary aggressive advance upon a moving or stationary vehicle to prevent the occupants from becoming "pedestrians." *See Wanzek*, 598 N.W.2d at 815; *Gonzalez*, 487 N.W.2d at 572. For example, had the officer arresting Gant anticipated the Arizona appellate court's new "confrontation" rule, he might have raced to Gant's car and held a gun to the window to prevent Gant's exit. In that event, Gant might have used his handgun in response. The *Gant* rule accomplishes nothing but escalated risk.

The legality of a vehicle search incident to a recent occupant's valid arrest should not turn on whether the individual was actually or constructively aware of the police before he exited the vehicle. The *Gant* approach creates the very problems for police and courts that *Belton* sought to avoid. Any "awareness of the police" test is antithetical to undercover police work. The whole idea of

undercover law enforcement activity, particularly arrests by undercover officers, is to avoid announcing the presence of the police before apprehending the offender. It would not be in the public's interest to force undercover officers to elect whether to announce their identity prematurely in compliance with *Gant*'s pre-exit contact rule or to forego a *Belton* search by remaining incognito until they can physically detain the person after he exits the vehicle.

2. The subjective *Gant* approach foments confusion among officers in the field and invites endless suppression-hearing litigation on subjective minutiae that would be irrelevant under an objective, recent-occupancy test.

Even where police officers are in uniform, a rule requiring case-by-case determinations of what prompted an occupant to exit his vehicle is certain to spawn confusion among law enforcement personnel, generate unwarranted mini-trials on subjective factual minutiae, and result in additional inconsistent legal rulings nationwide. In jurisdictions that have espoused the *Gant* rule or a similar rule, trial courts will be burdened with mini-trials on arrestees' and police officers' motivations and their actions in furtherance thereof in virtually every instance in which the government relies on *Belton*. Along with the inevitable inconsistent results, the *Gant* rule will cause substantial additional expenditures of time and resources due to the circumstantial nature of state-of-mind evidence.

This case exemplifies the unworkability and subjective nature of the initial contact rule. Even though the officer shined a flashlight in the window of Gant's car before Gant got out, enabling the officer to recognize

Gant's face through the driver's window, the court of appeals held that Gant was unaware of the police.

No rule or standard of review should be based upon a criminal defendant's after-the-fact averments about his mental processes. *See State v. Medrano*, 914 P.2d 225, 227 (Ariz. 1996) (murder defendant's self-serving testimony about his mental state at the time of the offense was "subject to skepticism"). A rule based on a person's actual or constructive awareness of the police invites litigation concerning an individual defendant's physical or mental condition, including expensive expert testimony on those matters. Disputes will arise concerning vision, hearing, mental acuity, as well as external influences on perception such as intoxication, weather conditions, lighting, ambient noise, and the physical characteristics of the arrestee's vehicle – facts irrelevant under a recent-occupancy analysis.

Police officers' subjective intentions rarely factor into Fourth Amendment analysis. *See Ohio v. Robinette*, 519 U.S. 33, 38 (1996) (objective circumstances of traffic stop allow officer to order driver out of car, "subjective thoughts notwithstanding"); *Whren v. United States*, 517 U.S. 806, 811-13 (1996) (stating that this Court is "unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers"); *Robinson*, 414 U.S. at 236 & n.7 (availability of "search incident to arrest" for officer safety does not depend on the officer's subjective mind set); *see also Scott v. United States,* 436 U.S. 128, 138 (1978) ("[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long

as the circumstances, viewed objectively, justify that action.").

Police should not be required to memorialize what they intended or attempted to do to get an occupant's attention while the individual was in the car. Nor should officers be required to divine an individual's motivation for exiting the vehicle. When multiple officers are involved, they may not agree on the arrestee's motivation. Further, when a vehicle contains multiple occupants, each individual could assert a different reason for exiting the vehicle, complicating the situation for the police and the courts. Moreover, a rule based on the occupant's state of mind invites dissimulation – pretending to exit the vehicle "voluntarily" although aware of the police.

Instead, officers should focus on the timing and location of the arrest in relation to the arrestee's occupancy of the automobile. Otherwise, the validity of many searches will remain anybody's guess until long after the fact – until trial courts undertake to sort out arrestees' and police officers' motivations and beliefs, and determine, where contested, the precise timing of any "confrontation" warnings vis-a-vis the occupants' exit from their vehicles.

One Arizona Court of Appeals judge, while concurring in *Gant*'s pre-exit "confrontation" rule, acknowledged the difficulties in determining which happened first – the confrontation or the occupant's exit:

> I have some concerns that our ruling today . . . may frustrate [the *Belton* Court's effort to establish a single familiar standard and avoid unnecessary case-by-case litigation] and incorporate unintended nuances into this already complicated Fourth Amendment arena. . . . [T]he fine

> lines that courts may have to draw in this area are problematic.

Gant, Pet. App. A, at ¶ 21 (Pelander, J., concurring).

Indeed, nearly limitless "unintended nuances" would frustrate the police and the courts under *Gant*'s contact-before-exit rule. For example, would an individual who has one foot in the vehicle and one on the ground at the instant of initial police contact be deemed "in" or "out" for purposes of the *Gant* rule? Would that depend on whether some part of his body was still touching the seat? What if he has both feet on the ground but the door is open and he is leaning into the passenger compartment – or just reaching in? What if the door is closed but he is leaning or reaching in the window? Would an arm or hand be enough, or would courts require that all or part of the torso be inside the car? What if the person is sitting on the tailgate of a station wagon or sport utility vehicle but his feet are touching the ground – could he merely stand up to render *Belton* inapplicable? What if the person is standing outside the vehicle but has left the engine running?

What would suffice for the requisite pre-exit police contact? Could it be non-verbal, such as a signal by hand, whistle, or flashlight? Or, because the contact-before-exit rule necessarily depends on the suspect's precise physical location at the time of initial contact, would the initial contact have to reflect the officer's present ability to make immediate physical contact? How would an undercover officer readily accomplish a pre-exit confrontation within the meaning of *Gant*? Under the *Gant* rule, given the endless variations in the facts that Fourth Amendment issues inevitably engender, many suppression hearings on *Belton* searches would become extended mini-trials on

factual minutiae, and the actions of police officers in the field would have no predictable legal consequences.

The Arizona Court of Appeals misconstrued *Belton* by holding it inapplicable because the record failed to show that the police had attempted to "signal confrontation" while Gant was in the car or that Gant was aware of the police before he got out. Instead of the individual's actual or constructive awareness of the police before exiting the vehicle, it is the mere fact that the individual was arrested while he was a recent occupant of the vehicle that justifies a *Belton* search. Gant's uncontested recent occupancy is dispositive under *Belton*. His car was properly searched incident to his arrest because his arrest occurred while he was a recent occupant. For all the foregoing reasons, this Court should reject the *Gant* court's distortion of the *Belton* rule and reverse the Arizona Court of Appeals' decision.

C. The Only Workable Standard For This Category Of Cases Is That The Arrestee's Recent Occupancy Of The Vehicle At The Time Of Arrest Triggers A *Belton* Search, Without Regard To The Arrestee's State Of Mind.

1. This Court intended in *Belton* to articulate a simple, workable standard.

In *Belton*, this Court intended to articulate "a single, familiar standard" that police officers can quickly and consistently apply to the circumstances that confront them: "[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Belton*, 453 U.S. at 460. In announcing that test, this Court stressed

that Fourth Amendment rules "'ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged'" and should not turn upon "'[a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions.'" *Id.* at 458 (quoting Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 S. Ct. Rev. 127, 142). This Court sought to articulate a "straightforward rule, easily applied, and predictably enforced." *Belton*, 453 U.S. at 459.

As this Court later observed, citing *Belton*:

> Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules.

Atwater, 532 U.S. at 347. A workable standard is essential:

> [T]he protection of the Fourth and Fourteenth Amendments can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.

Belton, 453 U.S. at 458 (citation and internal quotations omitted).

2. The only viable test is whether the arrest occurred while the individual was a recent occupant of the vehicle.

To determine whether *Belton* applies in a particular case, the only viable test is whether the individual was arrested while he was a recent occupant of the vehicle, i.e., while he was in close spatio-temporal proximity to his occupancy of the vehicle. Applying that test in *Belton*, this Court determined that Belton's recent occupancy of the vehicle justified the search incident to his arrest:

> [Belton's] jacket was located inside the passenger compartment of the car in which [Belton] *had been* a passenger *just before* he was arrested. The jacket was *thus* within the area which we have concluded was "within the arrestee's immediate control" within the meaning of the *Chimel* case.

Id. at 462 (emphasis added); *see also Long*, 463 U.S. at 1035 n.1 & 1049 n.14 (stating that, where an occupant exited the vehicle shortly before the initial police contact, the officers could have searched the car under *Belton* if they had arrested him: "*Belton* clearly authorizes [an automobile] search whenever officers effect a custodial arrest").

A determination of recent occupancy, based on the totality of the circumstances, is neither novel nor difficult. The "totality of the circumstances" concept is a familiar standard that officers in the field can apply in making the recent-occupancy determination. Police officers are trained to assess probable cause to arrest by considering whether

the totality of the circumstances supports a reasonable inference that an individual is engaged in criminal activity. They can easily employ an analogous test when deciding whether to search an arrestee's vehicle under *Belton*. Whether an arrestee is a recent occupant of the vehicle at the time of his arrest is a factual inference to be drawn from the circumstances at hand. *See United States v. Cortez*, 449 U.S. 411, 421-22 (1981) (police officers' professional experience is part of "the whole picture" supporting an inference of possible criminal activity); *Henry v. United States*, 361 U.S. 98, 102 (1959) ("Probable cause [to effect a warrantless arrest] exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.").

To determine whether an arrestee is a vehicle's recent occupant within the meaning of *Belton*, officers need only reasonably decide based on their training, experience, and the totality of the circumstances whether the arrest occurred in close spatio-temporal proximity to the arrestee's occupancy of the vehicle. The objective material factors will include, for example, the physical distance between the vehicle and the site of arrest, the time that elapsed between the occupant's exit from the vehicle and his arrest, and any statements the individual or other witnesses make concerning the individual's occupancy of the vehicle. In the uncommon instances where more than minimal time and distance are involved, an additional factor may be whether the individual created additional delay or distance from the vehicle by attempting to flee. *See United States v. Arango*, 879 F.2d 1501, 1505-07 (7th Cir. 1989) (*Belton* search upheld where defendant, who had fled from the area of the vehicle, was apprehended approximately one block away).

Gant's case, for example, is a run-of-the-mill *Belton* situation. Like Belton, Gant cannot seriously contest his recent occupancy of the vehicle at the time of arrest. The time and distance between Gant's exit from the vehicle and his arrest were de minimis. *See Thornton*, 325 F.3d at 196 (*Belton* search upheld where, although the record was "not clear as to the precise distance between [the defendant] and his automobile when [the officer] confronted him, the record . . . conclusively show[ed] that [the officer saw the defendant] park and exit his automobile and then approached [him] *within moments*") (emphasis in original). Further, because Gant's state of mind and what the police did or did not do to get his attention in the car are irrelevant, and because concerns for officer safety remain even when an arrestee is secured away from the car, nothing meaningfully distinguishes Gant's case from Belton's. *See Plakas*, 19 F.3d at 1145 (suspect handcuffed in back seat of squad car escaped and confronted police); *Sanders*, 994 F.2d at 210 & n.60 (citing incidents in which handcuffed arrestees killed police officers). Gant's car was properly searched as a contemporaneous incident to his arrest because he was a recent occupant of the car when he was arrested.

Other cases may present more difficult facts. *See, e.g., McLendon*, 490 So. 2d at 1309 (undercover officer waited to announce his presence until it was safe to arrest murder suspect inside a building, twenty to thirty feet from the suspect's car). But the Fourth Amendment's reasonableness requirement will ensure, just as it does in other categories of search and seizure cases, that the police and the courts implement *Belton* in a manner consistent with *Chimel*'s caution that there must be a "rational limitation"

to the scope of searches incident to arrest. *Chimel*, 395 U.S. at 766-67; *see Thornton*, 325 F.3d at 196 ("The conceded close proximity, both temporally and spatially, of [the defendant] and his car at the time of his arrest provides adequate assurance that application of the *Belton* rule to cases like this one does not render that rule limitless.").

Admittedly, this Court cannot announce precise boundaries for the recent-occupancy standard, but that does not impair the standard's utility or reasonableness. "No one case . . . is a proper vehicle for identifying the limits of [an] exception." *Oregon v. Kennedy*, 456 U.S. 667, 690 (1982) (Stevens, J., concurring). The value of an overarching standard "lies in [its] capacity for informed application under widely different circumstances without injury to defendants or to the public interest." *Wade v. Hunter*, 336 U.S. 684, 691 (1949). Reasonableness and common sense will establish and preserve rational limitations. *See South Dakota v. Opperman*, 428 U.S. 364, 375 (1976) ("'[W]hether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case.'" (quoting *Cooper v. California*, 386 U.S. 58, 59 (1967)).

This Court established an objective bright-line rule in *Belton* that can and should be applied in a simple and straightforward fashion, regardless of the suspect's actual or constructive state of mind before getting out of the car. The arrest itself triggers a vehicle search incident to a recent occupant's arrest, not whether the police initiated or attempted to initiate contact before the individual alighted from the vehicle. Applying the *Belton* rule differently would destroy its purposes.

CONCLUSION

For these reasons, the State respectfully requests that this Court apply the objective, recent-occupancy rule it applied in *Belton*, hold that it controls in Gant's case, and reverse and remand the case to the Arizona Court of Appeals with instructions to reinstate Gant's convictions and sentences.

Respectfuly submitted,

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